UNI ASIA GENERAL INSURANCE BHD A

v.

NORASHIKIN UZIR

HIGH COURT MALAYA, KUALA LUMPUR B
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-277-09]
29 MARCH 2010

INSURANCE: *Motor insurance - Loss or theft of motorcar - Insurer repudiating liability to indemnify - Exclusion clauses - Broken-down car left unattended without proper precautions being taken to prevent further loss or damage - No reasonable precautions to safeguard vehicle from loss or damage - Broken-down car left at open car park for five to seven days - Whether insured's conduct facilitated theft of car* C D

CIVIL PROCEDURE: *Judgment - Uncertainty - Alternative prayers in statement of claim allowed by Sessions Judge - Uncertainty as to which of two alternative claims plaintiff entitled to - Whether judgment defective and bad in law - Whether should be set aside* E

The respondent was the registered owner of a motorcar bearing registration number WEU 6226 purchased from the second defendant in the court below. The appellant was the insurer of the said motorcar *vide* a contract of insurance entered into between the respondent and the appellant. On 1 March 2003, the said motorcar broke down on the highway whilst being driven by SP1. SP1 claimed he contacted Peronda Lebuhraya Utara Selatan (PLUS) and caused the said motorcar to be towed to the rest area car park at the Lembah Beringin Toll Plaza. On 7 March 2003, the second defendant discovered the said motorcar was missing from the said toll and informed the respondent accordingly. The respondent notified what had happened to the appellant with a view to claim indemnity under the said policy for loss sustained by her by reason of the loss of the said motorcar. The appellant, however, repudiated its liability to indemnify the respondent under the policy on two grounds (i) the loss sustained by the respondent was excluded by reason of General Exception 7(c) of the said policy and (ii) the respondent was in breach of condition 7(c)of the said policy. The Insurance Mediation Bureau (IMB) endorsed the appellant's repudiation and the respondent's claim was F G H I

A therefore disallowed. The respondent then took out an action, seeking relief against the appellant and the second defendant. After a full trial, the Sessions Court Judge allowed the respondent's claim against the appellant but dismissed the claim against the second defendant. The appellant was thus found liable.
B Dissatisfied with the said order, the appellant appealed to this court.

Held (allowing the appeal with cost):

C **(1)** The wordings in cl. 2(b) of the policy entailed a duty upon the court to determine the market value of the motorcar and the court must also determine the actual amount payable under the policy. In this case, the claim made by the respondent against the appellant in the statement of claim were for a sum of RM50,897 or alternatively the sum of
D RM35,000. However, from the judgment, it could not be ascertained which amount was allowed, and the judgment was therefore bad as it did not indicate which of the alternative prayers had been awarded. Hence, the judgment was a defective judgment and should be set aside. On the grounds
E of uncertainty of which amount was awarded and the correctness of the amount alone, the appeal should be allowed. (para 10)

(2) It was a clear admission on the part of the respondent that
F the said motorcar was left unattended at an open parking place. It was a known fact that car theft could easily occur. The said motorcar was left at the parking bay for a period of five to seven days without proper precautions taken which was unreasonable and amount to an act of gross negligence.
G Further, the appellant contended that SP1 should have notified PLUS personnel so that they would have taken steps to monitor the said motorcar from time to time until the car could be removed to a workshop, which was not done by SP1. It was SP1 and the respondent's version that the car
H was towed by PLUS highway operator. By virtue of s. 103 of the Evidence Act 1950, the burden lay upon the respondent to prove PLUS involvement. The respondent had not called PLUS personnel to testify in court. By necessary implication, they had failed to discharge the burden of proof required of
I them. Therefore, the respondent's allegation that PLUS personnel was notified of the said motorcar being parked at

the parking bay stood uncorroborated. In the circumstances, what was proven was the act of leaving the motorcar at the open public parking bay, unattended and without monitoring for a few days, resulting with the car being stolen. It was beyond doubt that such an act was unreasonable and careless with an inevitable result of Exception 7 applying in this case against the respondent. The conduct of the respondent had facilitated the loss of the motorcar. Her failure to respond immediately and taking positive steps to prevent the theft of the car was an unreasonable and reckless act. The respondent's claim ought to have been dismissed. (paras 15-18 & 22-23)

For the appellant - SN Seelan; M/s Athiseelan
For the respondent - En Firuz; M/s Firuz Jaffril, Aidil & Zarina

Reported by Suhainah Wahiduddin

JUDGMENT

Hadhariah Syed Ismail JC:

[1] On 27 February 2009, the appellant/first defendant was found liable by the learned Session's Court Judge to pay to the respondent/plaintiff as follows:

1. a sum of RM50,897;
2. alternatively, a sum of RM35,000 being the amount entitled to be received by the respondent under the insurance policy;
3. cost;
4. interest at the rate of 8% per annum on the damages from the date of filing of the writ till satisfaction.

[2] Dissatisfied with the said order, the appellant appeal to this court.

Brief Facts

[3] The respondent was the registered owner of a motorcar bearing registration number WEU 6226. The said car was purchased from the second defendant, who was a used car dealer. The appellant was the insurer of the said motorcar *vide* a contract of insurance entered into between the respondent and the

appellant pursuant to the issuance of a Cover Note No. C-040527 by the second defendant. The cover note was valid for a period from 22 February 2003 till 21 February 2004 subject to the usual terms and conditions applicable to a private car policy.

[4] On 1 March 2003, the said motorcar broke down along the North-South highway near Lembah Beringin whilst being driven by one Mohd Rizal bin Mohd Jailani (SP1) on his way to Kuala Lumpur. SP1 claimed he contacted Peronda Lebuhraya Utara Selatan (PLUS) and caused the said motorcar to be towed to the rest area car park at the Lembah Beringin toll plaza. Subsequent thereto, he informed the respondent of this fact who later notified the second defendant's representative (SD3) of the same.

[5] On 7 March 2003, the second defendant discovered the said motorcar was missing from the said toll plaza and informed the respondent accordingly.

[6] On 22 March 2003, SP1 lodged a police report at the Kerling Police Station, stating the event that took place. The respondent notified what had happened to the appellant with a view to claim indemnity under the said policy for loss sustained by her by reason of the loss of the said motorcar. Upon examination and evaluation of the respondent's claim, the appellant repudiated its liability to indemnify the respondent under the policy on two grounds. Firstly, the loss sustained by the respondent is excluded by reason of General Exception 7. Secondly, the respondent was in breach of Condition 7(c) of the said policy. In short, the appellant relied on the exclusion clause to repudiate liability.

[7] The said termination was communicated to the respondent *vide* a letter dated 17 November 2003.The respondent appealed against the said decision *via* a letter dated 19 February 2004. The appellant maintained its decision and advised the respondent to refer the matter to the Insurance Mediation Bureau (IMB). After examining the respondent's claim, the IMB endorsed the appellant's repudiation by a letter dated 8 December 2004. The respondent's claim was therefore disallowed. The respondent then took out this action, seeking relief against the appellant and the second defendant. After a full trial, the learned Session's Court Judge allowed the respondent's claim against the appellant but dismissed the claim against the second defendant.

Ground Of Appeal

[8] The main ground for the appeal is the failure of the trial judge to evaluate the evidence at the trial in its entirety.

[9] The issue to be decided by this court is whether based on the evidence, the trial judge was correct in coming to the decision he made.

[10] Before I proceed to consider the merits of the appeal, learned counsel for the appellant has raised one preliminary issue. It is this. The claim made by the respondent against the appellant in the statement of claim are:

a) the sum of RM50,897;

b) alternatively the sum of RM35,000 being the claim which the respondent is entitled to receive under the terms of the policy.

BUT the judgment of the learned Session's Judge dated 27 February 2009 states the respondent's claim against the appellant is allowed with cost. This is reflected in the draft judgment itself (see p. 16-17 of the appeal record). One look at the judgment, it cannot be ascertained which amount is allowed. Bearing in mind the respondent's claim is made in the alternative, that is either RM50,897 or RM35,000, it is the appellant's submission that the judgment is bad as it does not indicate which of the alternative prayers has been awarded. Learned counsel for the appellant further submit, in the case of the sum of RM35,000, sections A cl. 2(b) of the policy states that the "maximum amount we will pay is the market value of your vehicle at the time of the loss or the sum insured in the policy, whichever is the lower figure." The wordings in this clause entail a duty upon the court to determine the market value of the motorcar. Therefore it is submitted by counsel for the appellant that even if the Session's Judge intended to allow the alternative prayer (b) of the statement of claim, the court ought to have undertaken an evaluation of the market value of the motorcar at the time of the loss prior to making the award. In other words, the court must determine the actual amount payable under the policy. It is not a case of the court merely endorsed the amount claimed by the respondent. It is for these reasons, learned counsel for the appellant submit the judgment dated 27 February 2009 is bad in law and must be set aside. I agree entirely with the submission of learned counsel for the

appellant on the issue of defective judgment. On the grounds of uncertainty of which amount is awarded and the correctness of the amount alone, this appeal should be allowed. However, I will proceed to examine the other grounds submitted by the appellant.

Failure To Evaluate Evidence

[11] The crux of the appellant's defence rest on the General Exception 7. It reads as follows:

> We will NOT pay for any liability under the following circumstances:
>
> 7. If in the event of any accident or breakdown, Your Vehicle is left unattended without proper precautions being taken to prevent further loss or damage and if Your Vehicle is driven in an unroadworthy condition before the necessary repairs are effected, any extension of the damage or any further damage to Your Vehicle shall be excluded from the cover granted by this policy.

[12] What the appellant need to do to escape liability under this clause is to show that the said motorcar was left unattended without proper precautions being taken to prevent further loss or damage. The appellant sought to show this is precisely the case here.

[13] The event leading to the theft of the motorcar begins when the car broke down along the highway. The fact that the motorcar broke down is not disputed. It is the subsequent conduct of the respondent and her witness on how they react to solve the problem is crucial to this case. SP1, the driver of the motorcar in his evidence said the motorcar was towed by PLUS personnel to the toll parking area. After informing the respondent, he locked the car and left it there. On 7 March 2003, he was informed by the representative of the second defendant (SD3) the said motorcar was missing. In cross-examination, the respondent agreed to the following facts:

1. That the said motorcar was left unattended without supervision and without anyone monitoring it.

2. That the said motorcar was left unattended as stated in Exception 7.

3. That the act of leaving the said motorcar at the parking bay near the said toll Plaza without supervision was unreasonable.

[14] Despite of the above, the learned Session's Judge conclude "It cannot be right that the vehicle owner be expected to perform guard like duties on a 24 hour basis on a car that has broken down and is then parked in a proper parking place with the presence of people 24 hours a day". A

[15] I find this conclusion is contrary to the evidence available before the court. It is a clear admission on the part of the respondent when she agrees the said motorcar was left unattended at an open parking place. It is a known fact that car theft can easily occur. Being parked at an open space with no one around to supervise it, it is almost inviting the thief to steal it. What more, when the said motorcar was left at the parking bay for a period of five to seven days without proper precautions taken is unreasonable and amount to an act of gross negligence. Since the express provision of the General Exception 7 excludes the appellant's liability if the vehicle is left unattended, the respondent's claim should have been dismissed. B C D

[16] Another important point raised by the appellant relates to whether PLUS personnel was notified that the said motorcar was parked there. The evidence of SD3 is the PLUS personnel was not notified of the said motorcar being parked there. This piece of evidence was not evaluated by the Session's Judge. It is the appellant's contention that SP1 should have notified PLUS personnel so that they would have taken steps to monitor the said motorcar from time to time until the car could be removed to a workshop. Or else SP1 could have contacted the nearest police station and informed of the predicament he has so that the police had notice and could patrol the area. None of this was done by SP1. E F G

[17] With regard to the role played by PLUS, the Session's Judge took the view that the burden of adducing steps taken by PLUS highway operator was on the appellant and not respondent. The appellant took strong objection to this conclusion because it was the respondent who adduced evidence of PLUS involvement. I agree with the appellant's contention. It was SP1 and the respondent's version that the car was towed by PLUS highway operator. By virtue of s. 103 of the Evidence Act 1950, the burden lies upon the respondent to prove PLUS involvement. The duty to call PLUS personnel also rest with the respondent. H I

[18] The respondent has not called PLUS personnel to testify in court. By necessary implication, they have failed to discharge the burden of proof required of them. Therefore the respondent's allegation that PLUS personnel was notified of the said motorcar being parked at the parking bay stands uncorroborated. In the circumstances, what is proven is the act of leaving the motorcar at the open public parking bay, unattended and without monitoring for a few days, resulting with the car being stolen. It is beyond doubt that such an act is unreasonable and careless with an inevitable result of Exception 7 apply in this case against the respondent. The respondent's claim ought to be dismissed.

Breach Of Condition 7(c) Of The Policy

[19] Condition 7(c) is a condition precedent to the liability of the appellant. It reads:

> This policy will only be operative if:
>
> (c) You have taken all reasonable precautions to safeguard your vehicle from loss or damage.

[20] Again, here what the appellant sought to show is the lackadaisical attitude of the respondent upon being informed of the breakdown of the said motorcar on 1 March 2003. Apart from asking SD3 on 2 March 2003 to take back the motorcar to Penang, the respondent did not do anything between 2 March 2003 to 7 March 2003. The respondent seems content with the car being left almost a week at an open parking area in a public place unattended. To make matters worse, even after the loss of the motorcar, the respondent did not lodge a police report. Only on 22 March 2003, a police report was lodged and that also by SP1.

[21] On the other hand, evidence led by SD3 show, on 7 March 2003 he went to the place where the motorcar was taken. There, he saw the parts of the said motorcar were lying on the floor with the body part of the car was nowhere to be seen. Having identified the thief, SD3 informed the respondent. It is the evidence of SD3 that the respondent agreed not to lodge a police report if the thief agreed to fix the said motorcar back. The thief, identified as Babuji agreed to put the said motorcar back. Later, when SD3 did not hear from Babuji, he advised the respondent

to lodge a police report. Till the day the case was heard, the respondent did not lodge a police report. It is obvious from the above that the respondent's conduct demonstrate she couldn't care less with what had happened.

[22] To sum up, based on the totality of evidence before the court, I entirely agree with the appellant's submission that the conduct of the respondent has facilitated the loss of the motorcar. Her failure to respond immediately and taking positive steps to prevent the theft of the motorcar is an unreasonable and reckless act. This justify the imposition of Exception 7 and condition 7(c). I was of the opinion, if the Session Judge give a proper consideration to the conduct of SP1 and the respondent as a whole, he should have dismissed the respondent's claim.

[23] For the above reasons, I allowed this appeal with cost.